

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VANESSA PEAKE,

Plaintiff,

No. 09-CV-10348

vs.

Hon. Gerald E. Rosen

MARTINREA FABCO
HOT STAMPING, INC.,

Defendant.
_____ /

ORDER ADOPTING MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION AND DENYING
DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on March 28, 2011

PRESENT: Honorable Gerald E. Rosen
United States District Chief Judge

This Whistleblower's Protection Act action is presently before the Court on Defendant Martinrea Fabco Hot Stamping, Inc.'s March 14, 2011 Objections to Magistrate Judge Michael Hluchaniuk's February 28, 2011 Report and Recommendation in which the Magistrate Judge recommends that the Court deny Defendant's Motion to Dismiss or for Summary Judgment. Magistrate Judge Hluchaniuk determined that the evidence presented demonstrates that issues of fact exist with respect to the issues of causation and pretext. Defendant contends these determinations are erroneous. The Court

disagrees. The evidence submitted presents a number of material issues of disputed fact. Such factual disputes, as well as the issue of credibility presented by the testimony of witnesses, are matters for a jury to decide.

Defendant also objects to the Report and Recommendation because the “protected activity” relied upon by the Magistrate Judge in drawing his conclusions about Plaintiff’s Whistleblower claim (Complaint, Count I) was not alleged in Plaintiff’s Complaint. Defendant further objects because Plaintiff did not mention in her Complaint the violation of Detroit City Ordinance 08-05 in her violation of public policy claim in Count II of her Complaint. Therefore, Defendant argues that it was not afforded fair notice.

The notice inquiry necessarily proceeds on a case-by-case basis. *Carter v. Ford Motor Company*, 561 F.3d 562, 568 (6th Cir. 2009). The Sixth Circuit has repeatedly found that a claim raised in response to a summary judgment motion provides sufficient notice to the opposing party. *See e.g., Bond v. Cox*, 20 F.3d 697, 700-01 (6th Cir. 1994); *Vencor v. Standard Life & Accident Ins. Co.*, 317 F.3d 629, 642 n. 11 (6th Cir.2003); *Howington v. Quality Rest. Concepts, LLC*, 298 F. App’x 436, 442 n. 6 (6th Cir.2008) (unpublished); *see also Carter v. Ford, supra*.

Furthermore, pursuant to Federal Rule of Civil Procedure 56(c), the Magistrate Judge was authorized to consider all pleadings, depositions, affidavits and admissions on file in order to determine whether summary judgment was appropriate. *See Matsushita*

Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Therefore, issues raised in Plaintiff's Response Brief and in her deposition were properly before the Magistrate Judge for consideration in ruling upon Defendant's Motion for Summary Judgment. The Court further notes that Defendant had ample time to file a Reply Brief and to present evidence supporting its position on these issues before the summary judgment hearing and the Magistrate Judge's issuance of his R&R. Accordingly, the Court concludes that Defendant had proper notice of Plaintiff's claims regarding the "protected activity" and the Detroit Ordinance ruled upon by the Magistrate Judge. *See Bond v. Cox, supra*.

For all of the foregoing reasons,

IT IS HEREBY ORDERED that Defendant's Objections to the Magistrate Judge's Report and Recommendation are OVERRULED.

IT IS FURTHER ORDERED that the Magistrate Judge's Report and Recommendation of February 28, 2011 [**Dkt. # 35**] is adopted by the Court.

IT IS FURTHER ORDERED that, for the reasons stated in the Report and Recommendation, Defendant's Motion to Dismiss and for Summary Judgment [**Dkt. # 23**] is DENIED.

s/Gerald E. Rosen
Chief Judge, United States District Court

Dated: March 28, 2011

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 28, 2011, by electronic and/or ordinary mail.

s/Ruth A. Gunther
Case Manager